1949

Alvin C. Spackman v. Alton J. Carson : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ALVIN C. SPACKMAN,
Plaintiff and Respondent

vs.

ALTON J. CARSON,
Defendant and Appellant

Case No. 6844

RESPONDENT'S BRIEF

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and Respondent.

Appeal from the District Court of the First Judicial District of the State of Utah, in for Cache County.

INDEX OF CASES AND STATUTES

POINTS

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STATEMENT OF FACTS

The plaintiff is 25 years of age and a resident of Richmond, Utah. On 25th day of October, 1947, he was the owner of a Harley Davidson Motorcycle, and was an experienced motorcycle operator. (Tr. 83, 84.) About 3:45 o'clock p. m. of said day, plaintiff was returning on his motorcycle from Logan City to his home in Richmond along U. S. Highway 91, which is an inter-state and National highway. The defendant's home is situated on the east side of said highway and about 1.2 miles south of Richmond. The highway at that point is straight and level, and runs about twenty degrees east of north. The weather was clear, and pavement dry. (Tr. 146.) The concrete pavement is 18 feet wide with a yellow center line, and with a six foot dirt shoulder on each side of the pavement. (Tr. 86, 87.) Defendant's 1½ ton truck

was parked about four feet east of the pavement on said highway in front of his home, facing north Tr. 88, 89, 90) and directly behind defendant's parked automobile. (Tr. 215.)

The plaintiff was traveling about 45 miles per hour and about in the middle of the east lane, (Tr. 145) and he first observed the truck when about 200 feet south of the same at which time the truck was motionless; (Tr. 146) and as plaintiff approached nearer and when about thirty feet south of place of collision, the defendant, without giving a signal (Tr. 96) drove his truck suddenly and directly onto the highway and immediately in front of the plaintiff. (Tr. 89, 162.) The truck was traveling about ten miles per hour and was entering the pavement on an angle of about 45 degrees with the highway. (Tr. 163, 157.)

As soon as plaintiff saw the truck moving onto the pavement in front of him he immediately applied his brakes, (Tr. 166) and turned his motorcycle to the left, endeavoring to avoid a collision, and at the time of impact the front end of the truck had reached a point about on the center line of the highway, (Tr. 162, 170) and the motorcycle collided with the truck at the rear end of the left front fender and in front of left door of the cab. (Tr. 95, 96.) The plaintiff and the motorcycle both hurdled over the hood or front end of the truck; the motorcycle landing in the west lane and the plaintiff on the west shoulder of the highway, and about 15 or 20 feet northwest from point of impact. (Tr. 96, 97, 113, 167.) The defendant's truck immediately turned off into the

east barrow pit and stopped about 6 or 8 feet north, from where plaintiff was lying on shoulder, and across the highway to the east side. (Tr. 97, 98.)

There is very little, if any real dispute between the plaintiff and defendant on the foregoing facts. While the defendant testified that he gave a signal before he started his truck forward, yet he also testified that he didn't look for traffic before he started, (Tr. 248) and that he drove his truck upon the pavement without stopping or looking for traffic coming from the south. (Tr. 248.) He testified that he looked straight ahead, (Tr. 248) and he admitted that he did not see respondent or the motorcycle until after the collision. (Tr. 169, 251.) The foregoing testimony clearly proves that the defendant absentmindedly drove his truck forward without giving a signal, or, without stopping before entering upon the pavement and without looking south to be sure that he could safely enter upon, or cross the highway. The fact that he didn't see the plaintiff before the collision clearly indicates that defendant did not look for traffic.

The plaintiff testified that the collision occurred about on the center line of the highway. (Tr. 96.) The defendant practically agrees with the plaintiff on this fact, since defendant stated that the left front wheel of the truck was about 2 feet east of center line at time of collision. (Tr. 217.) And defendant admits that the plaintiff and the motorcycle hurdled over the front end of truck and the defendant landed on west shoulder of the highway and the motorcycle stopped in the west lane. (Tr. 220.) The defendant could easily have been

mistaken as to the exact location of the collision, as he was sitting up in the cab, while the plaintiff was sitting on the motorcycle and nearer the pavement, and the plaintiff was aware of the impending accident and the defendant was not, (Tr. 169) because he did not see the motorcycle until after it collided with the truck. (Tr. 218.)

ARGUMENT

The only error appellant urges as a ground for reversal is that "the trial court erred in denying appellant's motion for a directed verdict in favor of appellant" and in support thereof on page 6 of his brief predicates two propositions: (1) There is no evidence appellant was negligent, and (2) that the proximate cause of the accident was the negligence of the respondent in failing to keep a lookout for appellant's truck, and to act properly in accord with the knowledge this would have brought him.

Under the facts, and the law applicable thereto, the effect of appellant's argument is an attempt on his part to entirely ignore the provisions of Section 57-7-132, and the puropse thereof.

Section 57-7-132, provides:

> "No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable saftey."

The rule involved in the foregoing statute was covered by the Court's instructions Nos. 13 and 15, (Tr. 56, 58.)

This statute has not been construed by this Court, but a companion statute, (Section 57-7-139) and one of similar import, was recently construed by this Court in the case of Nielson v. Mauchley, 202 P. 2d. 547, wherein the rule governing the duty of a motorist, about to enter a highway is laid down in the following language:

> "The true rule is that, under the section of the Vehicle Code above quoted, it is made the duty of the driver of an automobile *entering the highway* from a private drive *to look for approaching cars, and not to proceed if one is coming, unless,* as a reasonably prudent and cautious person he believes, and has a right to believe, *that he can pass in front of the other in safety.*" (Italics added.)

These statutes both require that the motorist entering a through highway, either from a standing position, or from a private road or driveway, shall look for and yield the right-of-way to all approaching vehicles on said highway.

Appellant at pages 3 and 5 of his brief attempts to make much of the fact that he moved the truck backward, then forward, etc., at a slow rate of speed before entering upon the highway and that the plaintiff should have seen him but did not – and that this testimony is uncontradicted. This statement is a strained and unreasonable interpretation of the testimony and unjustified. Nor is it accurate. It was contradicted. For example, respondent testified, (Tr. 162): "I seen – I was only just a short distance when the truck moved out immediately and into the highway.

Q. Onto the highway? A. Yes.

Q. And was that the time when you say you were about thirty feet south of it? A. Yes."

And there are at least two sufficient answers to appellant's contention: (1) The jury by their verdict decided not to believe this testimony. For instance, they could easily believe that if defendant made the maneuvers he claims to have made, respondent would have passed him before he entered the highway, and there would have been no accident, and (2) even if defendant did so move his truck, this fact, under the statutes above cited and the rule laid down by this Court in Nielsen v. Mauchley, supra, was not a warning to respondent, acting reasonably, that appellant would continue and enter upon the highway until he could do so in safety.

I. *Defendant's negligence was a proximate cause of accident.*

It is respectfully submitted by respondent that the preponderance if not the greater weight of the evidence, clearly shows that the proximate cause of the accident in this case resulted from the defendant's violation of the provisions of Section 57-7-132, as well as the foregoing rule laid down by this Court in Nielsen v. Mauchley, supra. It is further submitted that the preponderance of the evidence in the case at bar, supports the conclusion that the appellant, without thinking and without warning, suddenly and abruptly drove his truck upon the highway, directly in front of and in the path of the respondent's motorcycle, and completely barricaded the east lane of the highway, and so close in front of him that the re-

spondent, within the space, and the time available could not by the exercise of reasonable care have possibly avoided colliding with the appellant's truck.

The appelllant in his attempt to show that plaintiff was guilty of negligence, and that it was a proximate cause of the accident has cited the case of Conklin v. Walsh, 193 Pac. 2d. 437 (Utah.) The appellant attempts to compare the position of the defendant Walsh in that case with that of the plaintiff in the instant case, because as he says in his brief on page 9 —

> "While 200 feet back, he, Walsh, observed a vehicle approaching on his left and then failed to observe the approaching vehicle again until it was too late to avoid the collision."

There is no evidence in the instant case that the defendant's truck was moving toward or upon the highway when the plaintiff was 200 feet south of the defendant's truck. On the contrary, the evidence shows without dispute that when the plaintiff was 200 feet south of the defendant's truck, it was then standing motionless on the shoulder of the highway, facing north; and although the plaintiff was looking straight ahead, as he approached nearer the truck, he did not see it *move toward the highway* until he was about 30 feet south of the place of collision, at which time the defendant's truck moved onto the highway in front of the plaintiff, who was then so near the truck that all he could humanly do was apply his brakes and turn to the left endeavoring to avoid a collision. It will thus be seen that there is not the remotest resemblence between the facts in the Conklin case and the case at bar.

The appellant also cites a late Utah case, Mingus v. Olsson, 201 Pac. 2d. 495, which laid down the rule that "The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it." Respondent has no quarrel with that rule. And under the facts in that case it was properly applied.

A casual examination of the facts in that case will distinguish it from the facts in the case at bar. For instance, in that case the plaintiffs' intestate, a pedestrian, accompanied by his wife, were walking easterly on the south side of West Minister Avenue, and when they arrived at the intersection of said Avenue with 13th East Street, the defendant was traveling south some distance north of said intersection with his headlights burning. The undisputed evidence in that case, in fact the intestate's wife testified, that neither she nor her husband looked north to ascertain if an automobile was approaching, therefore, in the Mingus case there was no dispute about the decedent's failure to look for cars approaching from the north, and the evidence seems to show without dispute that the decedent and his wife walked absentmindedly into the path of defendant's approaching car, and it must also be remembered that in that case the plaintiff's intestate and his wife were entering a through street, while in the case at bar the plaintiff was traveling northerly on a through highway.

Appellant cites Hickok v. Skinner, (Utah) 190 P. 2d 514. In that case, the plaintiff was traveling north on West Temple Street and stopped for stop sign at 21st South, which street is an arterial highway. Plaintiff ad-

mitted that he saw defendant coming westerly on 21st South about 400 to 500 feet east from the intersection. Plaintiff then proceeded to cross the intersection and was struck by defendant's car in the north lane of traffic. The plaintiff admitted that although he was aware of defendant's car coming westerly, he nevertheless drove through the intersection without again looking to see where defendant was. That case is not in point with case at bar for at least two good reasons: (1) Hickok, the plaintiff, entered an arterial highway, 21st South Street, and his right to do so was governed by Section 57-7-138, U.C.A. 1943, which required him to yield the right of way to cars approaching the intersection on arterial highways, under certain conditions and (2) he failed to keep his eye on Skinner, the defendant, although he was aware of Skinner's presence on the highway.

The evidence shows with very little, if any, dispute that the negligence of the defendant was a proximate cause of the accident. We have heretofore pointed out that the evidence clearly shows that the plaintiff was traveling along the highway at a reasonable rate of speed, that he had the right-of-way and was looking ahead and as soon as the defendant started toward and upon the pavement, the plaintiff was then so close to the defendant that all plaintiff could do was apply the brakes and turn his motorcycle to the left in an attempt to avoid the accident. It thus definitely appears from the evidence that the plaintiff was operating his motorcycle in a careful and lawful manner; and the accident would not have occurred if the defendant, without looking and without warning, had not driven his truck onto the pavement, and thus barri-

caded the highway so closely in front of the plaintiff that he was without any means of escape.

We respectfully submit that the defendant was grossly negligent and that his course of action in entering upon the pavement as aforesaid, was the proximate cause of this accident, as that rule is defined in a recent and well considered case decided by this Court in Hess v. Robinson, 163 P. 2d. 510:

> "To be a proximate cause of an injury it must be an efficient act of causation and separated from its effect by no other act of causation. There must be a causal connection between the act or omission and the subsequent injury. 'The law does not search for the remote agencies by which an injury is brought about or made possible, *but holds the last conscious agent in producing it responsible therefor.*' Miner v. McNamara, 81 Conn. 690, 72 A. 138, 140, 21 L. R. A. N. S., 477. *It is one that directly causes or contributes directly to causing the result.*" (Italics added.)

II. *Case properly submitted to Jury to determine questions of fact.*

In the case at bar the plaintiff was traveling on the arterial highway and the defendant was required to yield right-of-way to plaintiff under Section 57-7-132 U.C.A. 1943, and as soon as plaintiff observed the defendant's truck entering upon the highway, he immediately took action to avoid the collision, but he was "trapped" and could not escape because of defendant's unlawful entry upon the highway. It will thus be seen that the factual situation, present in the case at bar, is entirely different from the factual situation present in the

three Utah cases cited in appellant's brief, pages 9-11. The plaintiff's evidence clearly showed that he acted as a prudent motorist would act under the same circumstances, and the evidence also shows that the defendant failed to yield the right-of-way to the plaintiff and, therefore it was clearly a case for the jury to decide from all the facts and circumstances in the case which party was at fault in bringing about a collision in this case. The trial court was well within its right in submitting this case to the jury. Therefore, the court did not err in denying defendant's motion for directed verdict.

Had appellant followed the course as indicated by his exhibit No. 1, the accident would not have happened, because plaintiff would have had sufficient room to pass him, inasmuch as it appears from defendant's exhibit No. 1, that the left front wheel of the truck only entered about half way over in the east lane of traffic. Thus leaving the plaintiff with ample room to pass. Moreover, it is admitted that the plaintiff's motorcycle collided with the rear end of the left front fender, so that, if the defendant's exhibit No. 1 is to be believed the plaintiff would have actually had to make a sharp turn to his left and then turn sharply back to his right in order to hit the truck on the angle shown by the injury to the fender. And likewise, it is difficult to perceive how the defendant would have landed over on the west shoulder of the highway had the collision taken place as shown by defendant's exhibit No. 1.

There is an attempt on the part of appellant by his exhibit No. 1 to show that the accident did not happen on the center line of the pavement as plaintiff testified,

thus there is a conflict in the evidence which was resolved by the jury. There are also other conflicts in the testimony which would necessarily have to be resolved by the jury, and not by the Court.

This case comes squarely within the rule that where the facts are conflicting and reasonable minds may differ as to the facts and circumstances existing immediately prior to the collision, the following rule as laid down by this Court in the case of Hess v. Robinson, 163 Pac. 2d. 510, is controlling. The language used by this Court is as follows:

> "As to what the circumstances were at the time plaintiff entered the intersection, and as to whether entering under such circumstances was an act from which a person of ordinary prudence and caution would have foreseen that some injury would likely result, are matters upon which reasonable minds may differ. As such they are properly for the jury. Proximate cause and contributory negligence are ordinarily questions of fact for the jury to determine under all the circumstances. * * * * * Questions of negligence do not become questions of law for the court except where the facts are such that all reasonable men draw the same conclusions."

CONCLUSION

The appellant's motion for a directed verdict was properly denied by the trial court. This appeal involves no question of law for the court, but only questions of fact

for the jury and, the jury by their verdict under proper instructions determined the issues in favor of plaintiff, and, that there is sufficient competent testimony to support their verdict.

The trial court instructed the jury as requested by appellant, and he had a fair trial. In fact, the trial court was rather liberal with the appellant in over emphasizing the question of contributory negligence by giving five instructions all relating to this question. (Instructions 3 to 7 inclusive, Tr. 46-50.) The appellant now wants to try this case over again, but he has failed to show any reason why he should be granted such a right.

For the foregoing reasons respondent respectfully submits that the verdict in this case should be sustained and the judgment of the trial court affirmed.

Respectfully Submitted,

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